No. 87-297

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

THE PORT AUTHORITY POLICE BENEVOLENT ASSOCIATION, INC.; and DOMINICK EVANGELISTA, individually and as President of the Port Authority Police Benevolent Association, Inc.,

Petitioners,

vs.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent,

Kirk Nelson, Donald F. Delano, Dennis Flavin, Charles Cossentine, Eugene Ceccarella and George Albin (Intervenors).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the respondent, Port Authority of New York and New Jersey, is a "person" amenable to suit under 42 U.S.C. § 1983.

2. Whether the respondent, Port Authority of New York and New Jersey, is entitled to a state's Eleventh Amendment immunity.

3. Whether the Court of Appeals erred by misapplying the Supreme Court decisions in *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978) and *Lake Country Estates v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979).

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No.

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THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

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Kirk Nelson, Donald F. Delano, Dennis Flavin, Charles Cossentine, Eugene Ceccarella and George Albin (Intervenors).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, The Justices of the Supreme Court of the United States of America:

The Port Authority Police Benevolent Association, Inc. and Dominick Evangelista, individually and as President of the Port Authority Police Benevolent Association, Inc., the petitioners,

by their attorneys, Smith, Don, Alampi & Scalo, file this petition for a writ of certiorari and present the following:

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is annexed hereto as Appendix A, and is reported at 819 F.2d 413 (1987).

STATEMENT OF JURISDICTION

Subject matter jurisdiction in this action was based upon 28 U.S.C. § 1331 in the United States District Court in that the plaintiff claimed a violation of constitutional rights and brought suit under 42 U.S.C. § 1983. Jurisdiction in the United States Court of Appeals was pursuant to 28 U.S.C. § 1291.

The date of the entry of the opinion filed by the United States Court of Appeals for the Third Circuit was May 27, 1987. This opinion is reported at 819 F.2d 413.

There have been no other orders affecting the issue here presented for consideration.

This petition for a writ of certiorari to the Third Circuit Court of Appeals is brought pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves an interpretation of the following:

42 U.S.C. § 1983

Every person who, under color of any statute,

ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

United States Constitution, Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.

STATEMENT OF THE CASE

Petitioner, Port Authority Police Benevolent Association, Inc. ("PBA"), is the majority representative of all Port Authority Police Officers, employed by the respondent, Port Authority of New York and New Jersey ("Port Authority"), below the rank of sergeant.

In September, 1980, the respondent published an announcement of the results of an examination for promotion of police officers to the rank of sergeant. The document, which became effective on February 1, 1981, stated its purpose as the establishing of a three-year "horizontal roster" from which the names of officers eligible for promotion to sergeant would be selected.

In October, 1984, the list expired as scheduled. On October

19, 1984, the PBA submitted a proposal for establishing a new police promotion system to replace the expired procedure. The Port Authority ignored the PBA's proposal, and on January 25, 1985, in violation of it own regulations, policies, and procedures, the Port Authority announced that it would extend the expired list indefinitely. Defendant subsequently made promotions from the expired list and announced its intention to continue to do so for an unspecified time.

Since 1971, an operating instruction for the provisional appointment of employees has authorized provisional promotions in order to insure continuous and efficient operations in a way that does not affect the permanent promotion opportunities of any employee. The employee handbook mandates that this provisional employment procedure be used. However, as long as the expired list is in force, officers who became eligible for promotion after the list was established cannot be considered for a promotion, and are denied the ability to pursue and attain present and future promotions along with commensurate salary, benefit, and prestige enhancement.

The PBA filed its complaint in this case against the Port Authority on March 28, 1985, pursuant to 42 U.S.C. § 1983, claiming that the Port Authority's actions had deprived members of the petitioner PBA of liberty and property without due process of law as secured by the Fifth and Fourteenth Amendments to the Constitution of the United States. The complaint sought an order (1) declaring the promotion list expired; (2) enjoining the Port Authority from resurrecting or using the expired list; (3) enjoining the Port Authority from making any permanent promotions to the rank of sergeant until a promotion system had been established; and (4) a declaration that the promotions made under the expired list were null and void. The complaint also sought attorney's fees and costs, as provided by 42 U.S.C. § 1988. Jurisdiction was based on 28 U.S.C. § 1331.

On December 19, 1985, the District Court delivered an opinion, finding that the respondent, Port Authority, had deprived the petitioners of a constitutionally-protected interest without due process, and enjoined the Port Authority from making further promotions from the expired list dated February, 1981. The District Court also set aside promotions made from the expired list after the expiration date. After the filing of the court's opinion, but prior to the entry of an order, six Port Authority police sergeants, who asserted that they were affected by the court's actions, petitioned for leave to intervene as defendants. Their petition was granted and entry of the order was stayed.

The six intervening sergeants moved to dismiss the action, arguing that: (1) the PBA could not maintain the action because the Port Authority is not a "person" within the meaning of 42 U.S.C. § 1983; (2) the action was barred by the "Consent to Suit" statutes of the Port Authority of New York and New Jersey (N.J.S.A. 32:1-157, *et seq.*); and (3) having previously chosen to present its claim in a state forum, the petitioners were precluded from bringing an action in federal court.

On September 25, 1986, the District Court entered an order granting the motion to dismiss on the intervenors' first and second claims, stating in its opinion that the Port Authority is protected by Eleventh Amendment immunity and is therefore not a "person" amenable to suit in the federal courts. The District Court denied the motion to dismiss on the third claim.

On appeal to the United States Court of Appeals for the Third Circuit, the judgment of the District Court was affirmed. A copy of this opinion is attached as Appendix A.

REASONS FOR GRANTING THE WRIT

As a basis for seeking a writ of certiorari in this Court, the petitioners assert, pursuant to Supreme Court Rule 17, that:

(1) The decision of the Court of Appeals for the Third Circuit is in conflict with applicable decisions of this Court;

(2) The decision of the Court of Appeals for the Third Circuit in this matter is in conflict with its own decisions; and

(3) The decision of the Court of Appeals for the Third Circuit in this matter is in conflict with decisions of other Courts of Appeals and District Courts.

A. Conflicts with Decisions of this Court.

1. Monell v. New York City Department of Social Services

In *Monell v. New York City Department of Social Services,* 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), the Court held that the word "person" as used in 42 U.S.C. § 1983, included "local government bodies," which could be sued under the Civil Rights Act.

The opinion for the Court based its decision in part on the fact that on February 25, 1871, just months before the Civil Rights Act was passed, an Act of Congress declared that "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense." § 2, 16 Stat. 431. It should be noted that the respondent herein is a body politic and corporate. (*See* N.J.S.A. 32:1-4.)

In *Monell*, the Court concluded:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.

The Court limited this sweeping language in a footnote where it said "Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes." (Footnote 54).

The upshot of *Monell* was to remove all barriers for civil rights suits against local governing bodies save one — the Eleventh Amendment would still be considered a bar to suits seeking money damages to be paid from the state treasury.

The petitioners submit that, contrary to the holding of the Court of Appeals, the present action is one against a local governing body, and thus is authorized by *Monell.*

2. Lake Country Estates v. Tahoe Regional Planning Agency

The determination of whether the respondent is a "local governing body" suable under *Monell* or "part of the State for Eleventh Amendment purposes" as indicated in *Monell's* Footnote 54, must be guided by the Court's decision in *Lake Country Estates v. Tahoe Regional Planning Agency,* 440 U.S. 391, 59 L. Ed. 2d 401, 99 S. Ct. 1171 (1979).

In that case the Court construed the dictates of the Eleventh Amendment as follows:

> By its terms, the protection afforded by that Amendment is only available to "one of the United States." It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power."
>
> If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity. *Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the Amendment.* [Emphasis added.]

Just as the Tahoe Regional Planning Agency is charged with the creation and implementation of a master plan for the geographic area under its control (*see Lake Country Estates v. Tahoe Regional Planning Agency,* 440 U.S. 391, 394, 59 L. Ed. 2d 401, 406), so too the Port Authority is authorized to prepare

and implement a master plan for the development of the port district (N.J.S.A. 32:1-35.74). In both cases, the essential function of the agency is development of a geographic area.

The legislation which created the Port Authority of New York and New Jersey states:

> The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact, but *it shall have no power to pledge the credit of either state or to impose any obligation upon either state*, or upon any municipality, except as and when such power is expressly granted by statute, or the consent by any such municipality is given. [N.J.S.A. 32:1-33, emphasis added.]

It is authorized to "purchase, construct, lease and/or operate any terminal or transportation facility" within its geographic authority, and to borrow money through its own bonds (N.J.S.A. 32:1-7).

However, petitioners do not argue that the Port Authority is indistinguishable from the Tahoe Regional Planning Agency. Petitioners contend only that the *principles* which led the Court to declare the Tahoe agency a "local governing body" without Eleventh Amendment immunity yield the same result when applied to the Port Authority of New York and New Jersey. These principles are as follows:

First, the rationale behind the Eleventh Amendment is a prohibition of raiding state treasuries. This admirable federalist purpose is inapplicable here. The Port Authority is financially self-sufficient, and, as indicated above, it has no power "to pledge

the credit of either state or to impose any obligation upon either state." N.J.S.A. 32:1-33. Although there is a provision for a maximum of $100,000 per year to be appropriated from each state "until the revenues from operations conducted by the port authority are adequate to meet all expenditures," (N.J.S.A. 32:1-16) this "seed money" is no longer relevant, as the Port Authority has been financially self-sufficient for many decades.

The Court of Appeals, in its opinion, misquotes Compact Article XV (N.J.S.A. 32:1-16) and its purpose. On page 8 of the Appendix, the Court quotes Compact Article XV as "Unless . . . the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate [the amounts needed]." The actual wording of Compact Article XV in full is as follows:

> Unless *and until* the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority and approved by the governors of the two states, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year. [Emphasis added.]

As is apparent, the full text of the provision does not bear out the impression conveyed by the excerpt quoted by the Court. Far from stating that "if the Authority is ever in need of financial support, the states will be there to provide it" (Appendix, page 8), the provision is simply for startup funds up to $100,000 per state.

Further evidence of the financial independence of the Port Authority is found in N.J.S.A. 32:1-140.1, *et seq,* where the Port Authority is authorized to issue its own bonds to be delivered to the states of New York and New Jersey to repay a debt to the states incurred in its planning for the Outerbridge Crossing, Goethals Bridge and Bayonne Bridge. The 1987 Port Authority budget totals more than $2 billion, and indicates annual insurance costs of $42 million and legal staff costs of nearly $16 million. (*See* Appendix C.) In addition, the 1987 budget provides for a payment by the Port Authority of $200,000 to each of its founding states to reimburse them for any costs incurred in reviewing the Port Authority's annual budget. Far from being a financial drain, the Port Authority has had the good fortune to be in a position to return money to its founding states.

Thus, it is clear that, in reality, any damages awarded in this action would not be paid out of either state's treasury.

Second, the Port Authority should not enjoy a state's Eleventh Amendment immunity because of its independence from its creating states. The independence of the Port Authority is shown by the fact that it is authorized to enter into agreements with the states of New York and New Jersey and agencies thereof, as well as with the United States (N.J.S.A. 32:1-35.23). And, as cited as compelling in *Lake Country Estates,* another factor indicating that the Port Authority is not an arm of the states is the fact that the states have had to sue the Port Authority from time to time to get it to do things which it did not want to do. [*See, for example, People of the State of New York v. The Port of New York Authority,* 64 Misc. 2d 563, 315 N.Y.S. 2d 9 (Sup. Ct., N.Y. County, 1970).]

Third, the intention of the states, as far as can be determined, was that the Port Authority be a local governing body, within the meaning of that term as used in *Monell v. Department of*

Social Services, supra. In N.J.S.A. 32:1-33, the Port Authority is referred to as the "municipal corporate instrumentality of the two states for the purpose of developing the port." New Jersey courts have defined a municipal corporation as "a body politic and a corporate entity as constituted by the inhabitants of a defined locality for the purposes of local government." The local character of the Port Authority's mandate is further evidenced by the opinion of the New Jersey Supreme Court in *County of Bergen v. Port of New York Authority,* 32 N.J. 303, 160 A.2d 811 (1960), in which the Court stated that the Port Authority "represents the residents of the Port District with respect to the public function entrusted to it."

Fourth, there is no breach of federalism in requiring that a bi-state agency, which was created only through the consent of Congress (*see* United States Constitution, Art. 1 § 10 and 42 Stat. 174), and which can be dissolved by Congress at any time (42 Stat. 180), be amenable to suit in federal courts.

The Court of Appeals misreads this Court's opinion in *Lake Country Estates* to the extent that it characterizes the result in that case as determined by the characteristic of the Tahoe Regional Planning Agency as "a creature of the counties rather than the states." (*See* Appendix, page 7.) The Tahoe Regional Planning Agency is a bi-state agency performing functions similar to those performed by a county. Likewise, the Port Authority of New York and New Jersey is a bi-state agency performing functions similar to a county. *County of Bergen v. Port of New York Authority,* 32 N.J. 303, 160 A.2d 811 (1960).

Under the principles set forth in *Lake Country Estates,* the Port Authority of New York and New Jersey is not entitled to the Eleventh Amendment immunity of its parent states.

B. Conflicts with Third Circuit Precedent

1. Blake v. Kline

In 1979, the Third Circuit decided *Blake v. Kline,* 612 F.2d 718, in which the matter of Eleventh Amendment immunity was raised and discussed at length. In that decision, the court stated nine factors to be considered in determining whether an agency is entitled to Eleventh Amendment protection. The court said:

> [L]ocal law and decisions defining the status and nature of the agency involved in its relation to the sovereign are factors to be considered, but only one of a number that are of significance.
>
> Among the other factors, no one of which is conclusive, perhaps the most important is whether, in the event plaintiff prevails, the payment of the judgment will have to be made out of the state treasury; significant here also is whether the agency has the funds or the power to satisfy the judgment. Other relevant factors are whether the agency is performing a governmental or proprietary function; whether it has been separately incorporated; the degree of autonomy over its operations; whether it has the power to sue and be sued and to enter into contracts; whether its property is immune from state taxation, and whether the sovereign has immunized itself from responsibility for the agency's operations.

Under this standard, the most important factor is whether, if the plaintiff prevails, a judgment will be paid out of the state treasury. As indicated above, there has not been and there is no provision for any continuing state funding to the Port Authority

of New York and New Jersey. The appropriations statute (N.J.S.A. 32:1-16) simply provides for startup money. The Port Authority's operations, including payment of many judgments each year, are fully covered by its own funds.

The local law and statutes defining the status of the Port Authority is also discussed above and, although not definitive, tends to show an intention that the Port Authority be treated similarly to a county.

The autonomy factors listed by the Third Circuit can be summarized as follows: The Port Authority is as completely autonomous within its statutory mandate, as is a county. This does not mean that it has the status of a foreign nation, nor should it. It must report to its founding states, but is not subject to the will of the states as indicated by the fact alluded to above that its founding states have taken it to court on several occasions. It performs both governmental and proprietary functions, as does a county. It is a body corporate and politic as is a county. It has the power to sue and be sued as does a county. Its property is immune from state taxation, much to the chagrin of the counties in its district. [*See, for example, County of Bergen v. Port of New York Authority,* 32 N.J. 303, 160 A.2d 811 (1960).] And, finally, the states have specifically disclaimed any legal liability for the actions of the Port Authority. N.J.S.A. 32:1-33.

As to the issue of the ability of the Port Authority to pay the claim raised, there is no doubt that the Port Authority can and does pay large money judgments on a regular basis. In fact, its by-laws authorize the Committee on Finance, in its discretion, to settle any claims against the Port Authority for sums less than $200,000. The money used to pay those judgments can in no sense be claimed by the taxpayers of the states of New York and New Jersey. The states would have no power, if the need presented itself, to raid the Port Authority's general fund. Its money is

separate and distinct from the states; its obligations are its own.

Thus, following the Third Circuit's own factors, the Port Authority should not be entitled to Eleventh Amendment immunity.

C. Conflicts with Other Courts

1. Second Circuit

In *Raysor v. Port Authority of New York and New Jersey,* 768 F.2d 34 (2d Cir. 1985), the Court of Appeals for the Second Circuit saw no impediment to a 42 U.S.C. § 1983 action against the very same respondent as herein if there had been a "showing that the injury was caused by execution of a custom or policy of the Port Authority, as required by *Monell v. Department of Social Services,* 436 U.S. 658, 691-95, 98 S. Ct. 2018, 2036-38, 56 L. Ed. 2d 611 (1978)." There was not such a showing in that case.

2. Fifth Circuit:

In *Jacintoport Corp. v. Greater Baton Rouge Port Commission,* 762 F.2d 435 (5th Cir. 1985), the Fifth Circuit found that an agency with purpose and duties quite similar to those of the respondent, Port Authority, did not enjoy Eleventh Amendment immunity. The Court said:

> Although the Commission's members serve at the pleasure of the governor, they enjoy considerable autonomy in the exercise of their powers. The Commission's activities are undertaken only for the Greater Baton Rouge Port, its bonds have only an ancillary effect on the state, and the Commission generates its own revenues. Finally,

> any judgment against the Commission by Jacintoport will, on the record before us, have no effect on the state treasury. We reverse the trial court.

The Court went on to say that although sometimes local governmental entities may be an arm of the state and thereby enjoy the state's Eleventh Amendment immunity, "independent local political subdivisions are not entitled to that immunity even though they exercise a 'slice of state power'." Petitioners submit that the Port Authority is every bit as much an "independent local political subdivision" as the Greater Baton Rouge Port Commission.

The Court also read this Court's Eleventh Amendment immunity decisions to conclude: "The purpose of the immunity therefore largely disappears when a judgment against the entity does not entail a judgment against the state." It went on to say that in that case:

> [E]ven the most favorable estimation of Jacintoport's monetary damages does not reach a tenth of the Commission's surplus revenue in a "good year" — of which it has had several recently. The State of Louisiana will not incur liability on this judgment's account.

The Fifth Circuit clearly found the fact that the judgment in the case before it would not come out of the state treasury as compelling, and stated so in its conclusion. The Third Circuit, in the case at bar, while acknowledging that there was little chance that the states would pay any judgment, nevertheless ignored the reality of the case in favor of the hypothetical position that "if the Authority is ever in need of financial support, the states will be there to provide it." (Appendix A, page 8.) This difference

in treatment of the reality of effect on the state treasury is a fundamental conflict in legal philosophy between the two Courts of Appeal which requires settlement by this Court. Petitioners submit that the Fifth Circuit rule is more appropriate in keeping with this Court's opinion in *Lake Country Estates*.

3. District Courts

In *Doris Trading Corporation v. SS Union Enterprise*, 406 F. Supp. 1093 (S.D.N.Y. 1976), the South Carolina State Ports Authority claimed Eleventh Amendment immunity. The Court, in denying Eleventh Amendment immunity, said:

> If the Authority is not an "alter ego" of the state, the fact that it is performing governmental functions has no bearing upon the question of whether it is cloaked by the Eleventh Amendment, for "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work."

The Court found that since the Authority had the power to pay all its own expenses and incur indebtedness in its own name, any judgment against it would have no effect upon the treasury of the State of South Carolina. Thus, the Eleventh Amendment was not found to be a bar to suit against the South Carolina State Ports Authority.

And in *Principe Compania Naviera, S.A. v. Board of Commissioners of the Port of New Orleans*, 333 F. Supp. 353 (E.D. Louisiana, 1971), the District Court refused to accord Eleventh Amendment immunity to the agency which controls the Port of New Orleans. In doing so, the Court said:

> Because the Eleventh Amendment bars otherwise

> meritorious causes of action, it has been construed narrowly. Suits against counties, municipalities and other lesser governmental agencies and corporations which have an existence independent of the state have not been held to be within the purview of the Eleventh Amendment.

The court noted "the historical desire of the state to establish a separate agency removed from state politics" and found that "Since the Board of Commissioners is not the State of Louisiana, the Eleventh Amendment does not bar plaintiff's invocation of our admiralty jurisdiction."

Petitioners submit that the respondent, Port Authority of New York and New Jersey, is indistinguishable from the South Carolina State Ports Authority and the Board of Commissioners of the Port of New Orleans. It should, like them, be amenable to suit in federal courts.

CONCLUSION

The decision of the Court of Appeals for the Third Circuit in this matter is in conflict with the decisions of this Court, as well as the decisions of other Courts of Appeal and District Courts. Pursuant to Supreme Court Rule 17, petitioners ask that its request for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5768

THE PORT AUTHORITY POLICE BENEVOLENT ASSOCIATION, INC.; and DOMINICK EVANGELISTA, Individually and as President of the Port Authority Police Benevolent Association, Inc.,

Appellants

vs.

THE PORT AUTHORITY OF NEW YORK and NEW JERSEY

Appellees

Kirk Nelson, Donald F. Delano, Dennis Flavin, Charles Cossentine, Eugene Ceccarella & George Albin (Intervenors)

On Appeal from the United States District Court for the District of New Jersey - Trenton
D.C. Civil No. 85-1477

Argued April 21, 1987

Before: WEIS, STAPLETON, and HUNTER,
Circuit Judges

Opinion filed May 27, 1987

Appendix A

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OPINION OF THE COURT

HUNTER, *Circuit Judge:*

1. This appeal arises from a complaint for injunctive relief brought under 42 U.S.C. § 1983 (1982) ("section 1983") by the Port Authority Police Benevolent Association ("PBA") against the Port Authority of New York and New Jersey ("Port Authority" or "Authority"). In January 1985, the Port Authority informed the PBA of its intention to use an expired promotion list to meet its current staffing and operational needs. After being rebuffed in its attempts to persuade the Port Authority Labor Relations panel to enjoin use of the list, the PBA filed a section 1983 action for injunctive relief in the United States District Court

for the District of New Jersey. In its complaint, the PBA contended that its members had been deprived of a valuable property interest without due process of law in violation of the Fourteenth Amendment. *See* U.S. Const. Amend XIV. In December 1985, the district court issued an opinion finding that the PBA had been deprived of a property interest without due process of law. The district court enjoined the Port Authority from further use of the expired list, and directed that the six promotions that had been made from that list be set aside. After this opinion had been filed, but before an order was entered, the individuals whose promotions were to be set aside were granted leave to intervene as defendants. The court granted their motion to dismiss the PBA's complaint on the ground that the Port Authority enjoys Eleventh Amendment immunity and is therefore not amenable to suit as a "person" under section 1983. This appeal followed. We affirm the order of the district court.

2. The Port Authority was created by an interstate compact entered into by New York and New Jersey in recognition of the fact that "the commerce of the port of New York has greatly developed and increased and the territory in and around the port has become commercially one center or district." N.J. Stat. Ann. 32:1-1 (West 1963); N.Y. Unconsol. Laws § 6401 (McKinney 1979). The compact was created by the two states in 1921, and approved by the Congress of the United States, as required by the Constitution of the United States. *See* U.S. Const. art. 1 § 10. We must determine whether such an interstate agency is an arm of the state immune from suit under the Eleventh Amendment, *see* U.S. Const. amend. XI, or a "person" amenable to suit under section 1983. We conclude that, under the Supreme Court's decision in *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), and our own decision in *Blake v. Kline*, 612 F.2d 718 (3d Cir. 1979), the Port Authority is entitled

to Eleventh Amendment immunity. *Cf. Mineo v. Port Authority,* 779 F.2d 939, 949 (3d Cir. 1985) (holding that the Port Authority should be treated as a state for Tenth Amendment purposes).

3. In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* the Supreme Court of the United States held that the interstate Regional Planning Authority ("RPA") created by California and Nevada was a "person" for purposes of section 1983. The Court held that, in order to enjoy Eleventh Amendment immunity, an entity created by interstate compact must be an arm of the compacting states rather than a body "comparable to a county or municipality." 440 U.S. at 401. Further, there must be "good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves." *Id.* Finally, it must be clear that "Congress concurred in [the States'] purpose." *Id.* To determine whether the RPA met these criteria, the Court focused on six factors: (1) How is the agency characterized by the language of the creating statutes? (2) From what governmental entity does the agency derive its funding? (3) Is the state financially responsible for the liabilities and obligations incurred by the agency? (4) Are the officers or members of the agency appointed by the state, or by county or municipal governments? (5) Is the function performed by the agency traditionally state or municipal? and (6) Are the actions of the agency subject to the state government's veto? We shall consider each of these factors in turn.

4. The application of the first *Lake Country Estates* factor is problematic, because the characterization of the Port Authority by the statutes creating it is somewhat inconsistent. The Port Authority is variously called a "joint or common [state] agency," N.J. Stat. Ann. 32:1-1 (West 1963); N.Y. Unconsol. Laws § 6401 (McKinney 1979), "a body corporate and politic," N.J. Stat. Ann.

32:1-4 (West 1963); N.Y. Unconsol. Laws § 6404 (McKinney 1979), a "person," N.J. Stat. Ann. 32:1-35.73(h) (West Supp. 1986), and "the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact." N.J. Stat. Ann. 32:1-33 (West 1963); N.Y. Unconsol. Laws § 6459 (McKinney 1979). The term, "joint or common agency" suggests that the Port Authority is a state agency entitled to immunity; the terms, "body corporate and politic" and "person" suggest vulnerability to suit under section 1983, *see Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 689-90 n.53 (1978); and the term, "municipal corporate instrumentality" suggests nothing definite in either direction, although its context suggests that the Authority was meant to be a state agency.

5. Since the statutory language is inconclusive, we will look to guidance from the courts of New York and New Jersey to determine how the state judiciary has characterized the Authority. *See Blake v. Kline,* 612 F.2d at 722 (" '[L]ocal law and decisions defining the status and nature of the agency involved in its relation to the sovereign are factors to be considered[.]' ") (quoting *Urbano v. Board of Managers,* 415 F.2d 247, 250-51 (3d Cir. 1969), *cert. denied,* 397 U.S. 948 (1970)), *cert. denied,* 477 U.S. 921 (1980). The state and federal courts of New York and New Jersey have consistently, whenever confronted with the question of whether or not the Authority is an arm of the state government, held that the Authority is a state agency performing functions on behalf of the state. *See, e.g., Mineo v. Port Authority,* 779 F.2d at 949 ("[f]rom its inception . . . , the Port Authority has been an entity of the two compacting states"), *cert. denied,* ____ U.S. ____ (1986); *Newark v. Board of Taxation,* 54 N.J. 171, 175, 254 A.2d 513, 515 (the Authority was created by the two states as "their joint agency"), *cert. denied,* 396 U.S. 987 (1969); *The Port*

Authority v. Bosco, 193 N.J. Super. 696, 700, 475 A.2d 676, 678 (1984) (per curiam) (" '[q]uotations of this nature could be multiplied indefinitely' ") (quoting *Whalen v. Wagner,* 4 N.Y.2d 575, 152 N.E.2d 54, 57, 176 N.Y.S.2d 616 (1958)); *Trippe v. Port of New York Authority,* 14 N.Y.2d 119, 122, 123, 198 N.E.2d 585, 249 N.Y.S.2d 409, 410, 411 (1964) (the Authority is a "governmental agency" and a "direct agency" of the two states). Indeed, when confronted with the specific question of whether the Authority was suable as a municipal corporation or immune from suit as an agency of the state, the United States District Court for the District of New Jersey concluded that "the Port Authority . . . is a joint or common agency of the states of New York and New Jersey. It performs governmental functions which project beyond state lines, and it is immune from suit without its consent." *Howell v. Port of New York Authority,* 34 F. Supp. 797, 801 (1940) (citations omitted). It is notable that this long-standing judicial characterization of the Authority has never been questioned by either state legislature despite the numerous opportunities to overrule these decisions presented by the periodic amendments the legislatures have made to the statutes creating the Port Authority. Thus, we conclude that the combined legislative-judicial characterization of the Authority indicates an intention on the part of New York and New Jersey that the Authority be considered a state agency for purposes of Eleventh Amendment immunity.

6. The next two *Lake Country Estates* factors focus on the financial functioning of the Authority. First, where does the Authority get its funding? At the present time, the Authority does not rely on annual appropriations from the state legislatures. However, under the original terms of the Compact,

Unless and until the revenues from operations

> conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority and approved by the governors of the two states, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year.

N.J. Stat. Ann. 32:1-16 (West 1963); N.Y. Unconsol. Laws § 6416 (McKinney 1979) (Compact Article XV). In 1931, the legislatures established a General Reserve Fund derived from the Authority's surplus revenues by which the Authority was able to become self-supporting. *See* N.J. Stat. Ann. 32:1-142 (West 1963); N.Y. Unconsol. Laws § 7002 (McKinney 1979). Thus, the states provided the Authority with financial support initially, and then devised a system whereby it could become financially independent. Appellant sets much store by the financial autonomy of the Authority, arguing that the Authority does not meet the *Lake Country Estates* criteria and is not a state agency. The appellant is mistaken. While the Authority's current funding structure does not provide conclusive evidence that the Authority is an agency of the state, it is nevertheless clearly distinguishable from the funding of the RPA found damaging to that agency's immunity claim in *Lake Country Estates*. The fatal aspect of the RPA's funding structure was the fact that it received its funding from its participating county governments rather than the state governments. *See* 440 U.S. at 402. This fact, together with the other significant characteristics of the RPA, indicated that it was a creature of the counties rather than the states, and thus could not enjoy Eleventh Amendment immunity. The Authority's ability

to be self-supporting as a result of the General Reserve Fund does not support the same conclusion. Significantly, the uses to which the money from the Authority's General Reserve Fund may be put are strictly circumscribed by periodic legislation and may only be dedicated to purposes within the Authority's statutory mandate and for the benefit of the citizens of the two states. This is in stark contrast to the RPA's use of its funds, which are directed towards the needs of the counties and their residents, and spent with no legislative input from the states. Thus, although the Authority is no longer directly funded by the states, we conclude that the history of its financial structure, and the statutory constraints placed on the use of its funds, indicate that the Authority is considered an arm of the states by New York and New Jersey.

7. A question closely related to the funding issue is whether or not judgments against the Authority would be binding on either of the states. Given the solvency and size of the General Reserve Fund, it is unlikely that the Authority would have to go to the state to get payment for any liabilities issued against it. *See Comprehensive Annual Financial Report of the Port Authority of New York & New Jersey for the Year 1985* at 42-44. If, however, a judgment were entered against the Authority that was serious enough to deplete its resources, the Authority would be able to go to the state legislatures in order to recoup the amount needed for its operating expenses. *See* N.J. Stat. Ann. 32:1-16 (West 1963); N.Y. Unconsol. Laws § 6416 (McKinney 1979) (Compact Article XV) ("Unless. . . the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate [the amounts needed]."). Indirectly, then, a judgment against the Authority could have some impact on the state treasury. Although the fiscal health presently enjoyed by the Port Authority renders this

conclusion purely theoretical, Compact Article XV nevertheless makes the states' intentions towards the Authority crystal clear: if the Authority is ever in need of financial support, the states will be there to provide it.

8. Finally, the last three *Lake Country Estates* factors all clearly support a conclusion that the Authority is a direct agency of the states rather than an independent corporation. First, the Port Authority's twelve commissioners are appointed by the governors of each state and confirmed by the state legislatures. They serve for "terms fixed and determined from time to time by the legislature of each state respectively," and are subject to removal in accordance with state law. N.J. Stat. Ann. 32:1-5 (West 1963); N.Y. Unconsol. Laws § 6405 (McKinney 1979). Second, the function performed by the Port Authority—the facilitation of commerce and transportation—is a state function in sharp contrast to the traditionally municipal function of land use planning fatal to the RPA's Eleventh Amendment immunity argument in *Lake Country Estates.* Third, the actions of the Port Authority's commissioners are subject to veto by the governor of either state. N.J. Stat. Ann. 32:1-17 (West 1963); N.Y. Unconsol. Laws § 6417 (McKinney 1979) (Compact Article XVI); N.J. Stat. Ann. 32:2-9 (West 1963); N.Y. Unconsol. Laws § 7153 (McKinney 1979). The statute is replete with still other significant indicia of state control over the Authority. For example, the Authority must make annual reports to both legislatures, N.J. Stat. Ann. 32:1-8 (West 1963); N.Y. Unconsol. Laws § 6408 (McKinney 1979), and both legislatures must concur in any proposed changes to the Authority's rules and regulations. N.J. Stat. Ann. 32:1-19 (West 1963); N.Y. Unconsol. Laws § 6419 (McKinney 1979). Furthermore, the Authority may not take on new projects unless expressly authorized to do so by the two state legislatures. *See The Port Authority v. Weehawken,* 14 N.J. 570,

580, 103 A.2d 603, 608 (1954) ("the Port Authority has no authority to proceed with the construction of the third tunnel [to the Lincoln Tunnel] until expressly authorized to do so by the two States"); *State Dept. of Transportation v. The Port Authority,* 159 N.J. Super. 102, 104, 387 A.2d 367, 368 (App. Div. 1978) (per curiam) ("the proposed highway construction cannot be undertaken or funded by the Authority without the affirmative authorization of the respective Legislatures of both states"). In sum, these limits on the operation of the Port Authority indicate that it functions as an agency of the state, not as an independent corporation.[1]

9. Although we conclude that the Port Authority is an agency of the state for purposes of Eleventh Amendment immunity under the Supreme Court's *Lake Country Estates* analysis, we do not read *Lake Country Estates* as setting out an exclusive list of factors to be considered in evaluating an Eleventh Amendment immunity claim. Accordingly, *Lake Country Estates* does not require us to ignore the insight and guidance offered by our own decision in *Blake v. Kline. See* 612 F.2d at 722. *Blake v. Kline* mentions three factors not considered by *Lake Country Estates* in evaluating an Eleventh Amendment immunity claim: (1) Is the entity performing a governmental or a proprietary function? (2) Does the entity have the power to sue and be sued? and (3) Is the property of the entity immune from state taxation? Examination of these additional factors does not alter our conclusion that the Port Authority is protected by Eleventh Amendment immunity.

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1. Also of importance to this case is the fact that "members of [the Port Authority] police force shall have all the powers conferred by law on police officers or constables in the enforcement of laws of this state and the apprehension of violators thereof." N.J. Stat. Ann. 32:2-25 (West 1963) (*construed in State v. Cohen,* 73 N.J. 331, 375 A.2d 259 (1977) (holding that Port Authority police share the power and authority of state police within the Port District).

Appendix A

10. First, the functions performed by the Port Authority are governmental, not proprietary. *See Howell v. Port of New York Authority,* 34 F. Supp. at 800 ("The construction, maintenance and operation of highways, bridges and tunnels is one of the primary governmental functions of the states.") (citations omitted). *Accord Whalen v. Wagner,* 4 N.Y.2d 575, 176 N.Y.S.2d 616, 152 N.E.2d 52, 54 (1958). Second, the states of New York and New Jersey have statutorily consented to suits against the Port Authority, with the notable exceptions of suits seeking injunctive relief. *See* N.J. Stat. Ann. 32:1-157 ff., 32:1-161 (West 1963); N.Y. Unconsol. Laws §§ 7101 ff., 7105 (McKinney 1979). Prior to the passage of the consent statutes, the Authority had been totally immune from suit. To the extent that these provisions constitute a capacity to "sue and be sued," there is nevertheless

> no merit to defendants' contention that because the Legislature abrogated this particular attribute of sovereignty by N.J.S.A. 32:1-157 the status of the Port Authority as a state agency was thereby withdrawn in all other respects. Indeed, the State of New Jersey itself, as well as all public entities within its boundaries, is answerable to suit. New Jersey Tort Claims Act, N.J.S.A. 59:1-2 *et seq.*

The Port Authority v. Bosco, 193 N.J. Super. at 700, 475 A.2d at 678.[2] Third, "the port authority shall be required to pay no taxes or assessments upon any of the property acquired and used by it for any of the purposes of this act." N.J. Stat. Ann.

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2. Furthermore, the Supreme Court has flatly rejected the proposition that the existence of a sue and be sued provision can, in and of itself, abrogate an agency's Eleventh Amendment immunity. *See Florida Dept. of Health and Rehabilitative Serv. v. Florida Nursing Home Ass'n,* 450 U.S. 147, 150 (1981).

32:1-35.82 (West Supp. 1986). Thus, under the more rigorous requirements of *Blake v. Kline,* the Port Authority is clearly an agency of the state and is thus entitled to Eleventh Amendment immunity. Appellants' section 1983 suit against the Port Authority was properly dismissed.

11. The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B—JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5768

THE PORT AUTHORITY POLICE BENEVOLENT ASSOCIATION, INC.; and DOMINICK EVANGELISTA, Individually and as President of the Port Authority Police Benevolent Association, Inc.,

Appellants

vs.

THE PORT AUTHORITY OF NEW YORK and NEW JERSEY

Appellees

Kirk Nelson, Donald F. Delano, Dennis Flavin, Charles Cossentine, Eugene Ceccarella & George Albin (Intervenors)

On Appeal from the United States District Court for the District of New Jersey - Trenton
D.C. Civil No. 85-1477

Present: WEIS, STAPLETON, and HUNTER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel April 21, 1987.

Appendix B

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 3, 1986, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

s/ Sally Mvros
Clerk

May 27, 1987

Costs taxed in favor of The Port Authority of New York and New Jersey as follows:

TOTAL COSTS OF BRIEF $1546.52

Certified as a true copy and issued in lieu of a formal mandate on June 18, 1987.

Test: s/ M. Elizabeth Ferguson
Chief Deputy Clerk, United States Court of Appeals,
for the Third Circuit.

APPENDIX C—1987 BUDGET OF PORT AUTHORITY OF NEW YORK AND NEW JERSEY

(Board - 4/9/87)

1987 Budget

It was reported that copies of the Budget for the year 1987 have been in the hands of all the Commissioners for their review, having first been presented to the Commissioners on October 29, 1986. The 1987 Budget is a product of the Port Authority's internal planning process and represents the estimated expenditures necessary to achieve the organization's objectives. These objectives are: to strengthen the Port Authority's capacity; to strengthen the competitive position of the Port of New York-New Jersey region; to provide a level of service that is responsive to current and projected changes in demand; and to expand the range of economic opportunities available to businesses in and residents of the region. The Budget is a financial planning tool which outlines the estimated expenditures for programs already authorized or to be considered by the Commissioners. Approval of these recommendations will enable the Port Authority to accomplish its mission.

The 1987 Budget for The Port Authority of New York and New Jersey, including the anticipated expenditures of subsidiary corporations, totals $2.1 billion. It consists of approximately $761 million in capital program expenditures and $1.1 billion of operating expenses (including $50 million, in addition to amounts previously authorized, related to retention, subject to approval by the Chairman of the Committee on Operations in accordance with selection guidelines filed with the Committee, of professional, technical or advisory services), $190 million of debt service charged to operations and reserves, $53 million of expenditures for the Fund for Regional Development and $64 million of other

expenditures, mostly related to future years (all exclusive of certain amounts which are reimbursable under the New York State Commuter Railroad Car Program).

The 1987 capital expenditures are for projects related to the Port Authority's Aviation, Interstate Transportation Network, Port, Economic Development and World Trade facilities and include a provision of $10 million for emergency repairs. The Budget also includes $75 million for expenditures on projects identified by the States of New York and New Jersey from funds made available for regional economic development pursuant to the Governors' agreement of 1983, and an allowance of $50 million for projects in development. Expenditures for construction contracts included in the 1987 Budget are shown in Exhibit A-2.

In 1987, Aviation's activities will be devoted to improving the capacity of the regional system of airports to meet current and future growth in passenger and air cargo traffic, and ensure the competitive position of the region's airports. Major investments in 1987 include the completion of Terminal C and expansion of parking lots at Newark International Airport, as well as on-airport improvements at LaGuardia Airport. At Kennedy International Airport, expenditures are related to the Nassau Expressway, additional air cargo facilities and implementation of a computerized air cargo inventory and clearance system. The Budget also provides for project development related to the major redevelopment of central terminal facilities and on-airport circulation systems at Kennedy International Airport (JFK 2000), and the substantial upgrading of ground access and circulation systems and parking at Newark International Airport (NIA 2000).

For Interstate Transportation Network facilities, the 1987 Budget provides for continued rehabilitation and modernization

of the PATH system and tunnel and bridge facilities to increase their capacity, safety, security and structural integrity and to develop new interstate capacity by advancing a project to provide ferry service from Hoboken to lower Manhattan. PATH's plans provide for rehabilitation and the purchase of cars, station improvements and continuation of safety upgrading. The Budget also provides for the purchase of buses for use in the States of New York and New Jersey under the Port Authority Bus Programs.

The Port Authority's marine terminal facilities will be modernized and expanded to provide capacity and to improve the competitive position of the port. Deepening of the Kill Van Kull and Newark Bay channels will be started, property will be acquired and construction of distribution buildings will be begun in Elizabeth, a new automobile import distribution facility will be developed in Bayonne and Jersey City, and the Fishport project in Brooklyn will be substantially completed.

Consistent with applicable legislation, the 1987 Budget provides for the Port Authority to expand business and employment opportunities in the region's inner cities. Provision is made for the expansion or acquisition of industrial parks in Yonkers, the Bronx and Newark and the Resource Recovery Facility in Essex County, New Jersey. Expenditures to substantially complete the Teleport on Staten Island and the Newark Legal and Communications Center, as well as advancing the Hoboken Waterfront Redevelopment Projects, are included in the Budget.

A provision of $400,000 is also included to reimburse the States of New York and New Jersey for expenses incurred by each State, including staff costs in reviewing the Port Authority's annual Budget and any amendments thereto.

Appendix C

The Board, at its meeting on December 11, 1986, acted to confirm the authority of the Executive Director to continue to make payments for expenses and to undertake contractual commitments through March 31, 1987, in accordance with the By-Laws, for continuing operations and professional services, all as contemplated in the proposed 1987 Budget presented to the Commissioners on October 29, 1986. The Board also acted to authorize the Executive Director to implement the annual salary range adjustment, including minor revisions in benefit programs to approve and authorize the appropriation for the purpose of capital expenditures to be made in 1987 of funds paid into and available in the Consolidated Bond Reserve Fund; and to continue the Port Authority's practice of annually setting aside amounts towards covering self-insured contingent losses. On March 12, 1987, the Board again acted to confirm the authority of the Executive Director to continue to make payments for expenses and to undertake contractual commitments through April 30, 1987.

It was therefore recommended that the 1987 Budget be approved. The Executive Director's authority, pending final adoption and approval of the annual Budget, to make operating expenditures and undertake contractual commitments for continuing operations and professional services would also be confirmed.

Whereupon, the following resolution was unanimously adopted: Commissioner Schulman stating that, "As I have previously stated, I dissent from so much of the proposed Budget approval which would provide for Port Authority operation of a significant deficit Trans-Hudson ferry passenger service, which I regard as financially imprudent, considering the surrounding facts and circumstances, particularly the history of a most substantial continuing operating deficit for PATH passenger service":

Appendix C

RESOLVED, that the following Budget for The Port Authority of New York and New Jersey be and the same hereby is approved and adopted for the year 1987, including authority for the Executive Director to retain, in accordance with appropriate procedures, professional, technical or advisory services, which is hereby recognized:

RESOLVED, that, based upon a requisition of the Governor of the State of New York or the Governor of the State of New Jersey, or the duly authorized designee of each, the Port Authority shall pay to the State of New York or the State of New Jersey, or both, upon receipt of an appropriate expenditure plan from said State, an amount not in excess of $200,000 to each said State to reimburse said State or States for expenses incurred by said State or States, including staff costs, in reviewing the 1987 annual Budget of the Port Authority and any amendments thereto.

Whereupon, the meeting was adjourned.

_____

Secretary

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY
Including Subsidiary Port Authority Trans-Hudson Corporation

1987 BUDGET
(Thousands of Dollars)

Item	Total Expenditures	Personal Services	Materials & Services	Other
Executive Offices				
Office of the Executive Director	$2,872	$1,000	$1,872	
General Administration	511		511	
Office of the Secretary	4,321	1,572	2,749	
Office of Minority Business	1,187	715	472	
Office of Capital Programs	486	380	106	
Chief Financial Officer	761	460	301	
Audit Department	6,517	4,876	1,641	
Finance Department	42,624	13,302	29,221	$101
Insurance Costs	42,238		42,238	
Debt Service	248,595			248,595
Expenditures on Behalf of Fund for Regional Development	52,913			52,913
Management and Budget Department	11,807	7,068	4,739	

Item	Total Expenditures	Personal Services	Materials & Services	Other
Payments of City Rent & In Lieu of Taxes	141,536			141,536
Office of Administration	601	376	225	
General Services Department	58,582	23,402	6,359 *	28,821
Personnel Department	22,671	13,383	9,288	
Office of Medical Services	4,292	2,350	1,942	
Management Information Services Department	25,150	14,355	(11,384)*	22,179
Government, Community and Public Affairs	7,441	3,661	3,780	
Law Department	15,923	9,762	6,161	
Planning and Development Department	18,057	9,366	8,691	
Public Safety Department	31,640	23,817	7,808	15
Engineering Department	142,472	60,808	66,471	15,193
Construction Contracts	220,289			220,289
Office of Interstate Transportation Network	980	506	474	
Ferry Transportation Services	8,648	1,524	7,124	
Construction Contracts	18,000			18,000
Tunnels, Bridges and Terminals				
Administrative and Planning	17,463	8,928	8,035	500
Holland Tunnel	19,334	15,522	3,812	

Item	Total Expenditures	Personal Services	Materials & Services	Other
Lincoln Tunnel	21,822	17,170	4,652	
George Washington Bridge	22,173	17,145	5,028	
Staten Island Bridges	12,536	9,873	2,663	
Port Authority Bus Terminal	31,156	18,592	12,564	
Construction Contracts	2,850			2,850
Rail Transportation Department				
Administration, Planning and Construction	24,264	9,641	7,445	7,178
PATH	98,213	72,365	25,848	
Journal Square Transportation Center	4,312	658	3,654	
Construction Contracts	2,780			2,780
Port Department				
Administration, Planning and Construction	21,827	6,552	8,775	6,500
Port Newark	6,690	4,277	2,421	
Howland Hook - P.A. Marine Terminal	322	255	67	
Elizabeth - P.A. Marine Terminal	2,854	2,002	852	
Greenville Yards - P.A. Marine Terminal	306	192	114	
Columbia Street Marine Terminal	141	58	83	
Erie Basin - Fishport	1,711	695	1,016	
Brooklyn - P.A. Marine Terminal	2,802	1,666	1,136	

Item	Total Expenditures	Personal Services	Materials & Services	Other
New York City Passenger Ship Terminal	4,776	1,045	3,731	
Red Hook Container Terminal	242	231	11	
Port Promotion	6,239	3,082	3,157	
Construction Contracts	79,460			79,460
Aviation Department				
Administrative and Planning	34,959	13,246	21,713	
LaGuardia Airport	36,910	19,899	17,011	
Newark International Airport	78,059	29,868	48,191	
John F. Kennedy International Airport	106,828	47,358	59,470	
Port Authority Heliports	5,463	1,129	1,544	2,790
Construction Contracts	211,319			211,319
World Trade Department				
Administration, Planning and Construction	13,871	7,731	6,140	
The World Trade Center	108,185	12,334	90,591	5,260
Trade Programs, including Foreign Trade Development Offices	7,321	3,556	3,765	
Newark Legal and Communications Center	927	424	503	
The Teleport	3,622	1,067	2,555	
Construction Contracts	47,415			47,415

Item	Total Expenditures	Personal Services	Materials & Services	Other
Economic Development Department	26,622	7,443	12,562	6,617
Construction Contracts	90,412			90,412
Bus Programs	50,700			50,700
Bank for Regional Development	75,000			75,000
Projects in Development	50,000			50,000
Provisions for Delays	(335,000)			(335,000)
Total Port Authority Budget	$2,128,008	$526,687	$549,898	$1,051,423
Agency Accounts (Reimbursable)				
Railroad Equipment Program	$13,763			

*Net after charges to other departments.

Appendix C

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

1987 BUDGET
CONSTRUCTION CONTRACTS
(Thousands of Dollars)

ENGINEERING DEPARTMENT	
PATH	$74,309
Holland Tunnel	34,670
Hoboken Waterfront Development	33,819
Essex County Resource Recovery Facility	12,126
Port Authority Industrial Park at Elizabeth	10,190
Bathgate Industrial Park	9,430
Lincoln Tunnel	8,958
Port Authority Industrial Park at Yonkers	8,393
Port Authority Bus Terminal	6,615
George Washington Bridge & Bus Station	5,350
Outerbridge Crossing	4,650
John F. Kennedy International Airport	3,500
Newark South Ward Industrial Park	2,314
Journal Square Transportation Center	2,165
Elizabeth - P.A. Marine Terminal	1,000
World Trade Center	1,000
Bayonne Bridge	950
Goethals Bridge	850
Total	220,289
FERRY TRANSPORTATION SERVICES	
Ferry Transportation	18,000

Appendix C

TUNNELS, BRIDGES & TERMINALS DEPARTMENT

Bayonne Bridge	2,450
Holland Tunnel	200
George Washington Bridge	200
Total	2,850

PORT DEPARTMENT

Elizabeth - P.A. Marine Terminal	16,437
Howland Hook - P.A. Marine Terminal	14,160
Erie Basin - P.A. Marine Terminal	11,700
Oak Point Rail Freight Link	10,200
Port Newark	9,538
Greenville Yards - P.A. Marine Terminal	6,000
United States Navy Homeport	5,000
New Jersey Marine Development	4,000
Autoport	1,000
Brooklyn - P.A. Marine Terminal	860
NYC Passenger Ship Terminal	565
Total	79,460

AVIATION

John F. Kennedy International Airport	75,000
Newark International Airport	118,719
LaGuardia Airport	15,100
P.A. Downtown Manhattan Heliport	2,500
Total	211,319

WORLD TRADE DEPARTMENT

Newark Legal and Communications Center	$33,300
World Trade Center	7,320
The Teleport	6,795
Total	47,415

Appendix C

RAIL TRANSPORTATION DEPARTMENT	
Bus Programs	50,700
PATH	2,780
Total	53,480
ECONOMIC DEVELOPMENT	
Essex County Resource Recovery	83,787
Port Authority Industrial Park at Elizabeth	3,325
Bathgate Industrial Park	2,300
Port Authority Industrial Park at Yonkers	1,000
Total	90,412
Total Construction Contracts	$723,225

87-297

No.

Supreme Court, U.S.
FILED
OCT 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE PORT AUTHORITY POLICE BENEVOLENT ASSOCIATION, INC.; and DOMINICK EVANGELISTA, individually and as President of the Port Authority Police Benevolent Association, Inc.,

Petitioners,

vs.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent,

Kirk Nelson, Donald F. Delano, Dennis Flavin, Charles Cossentine, Eugene Ceccarella and George Albin *(Intervenors).*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No.

IN THE

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OCTOBER TERM, 1987

THE PORT AUTHORITY POLICE BENEVOLENT ASSOCIATION, INC.; and DOMINICK EVANGELISTA, individually and as President of the Port Authority Police Benevolent Association, Inc.,

Petitioners,

vs.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent,

Kirk Nelson, Donald F. Delano, Dennis Flavin, Charles Cossentine, Eugene Ceccarella and George Albin *(Intervenors)*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals was correct in affirming the dismissal of the complaint upon the ground that Respondent, The Port Authority of New York and New Jersey, is immune from suit pursuant to the Eleventh Amendment to the Constitution.

COUNTERSTATEMENT OF THE CASE

The Port Authority of New York and New Jersey (Port Authority) was created on April 30, 1921 by a Congressionally consented-to Compact between the States of New York and New Jersey. The Compact established the Port Authority as a joint and common agency of the States of New York and New Jersey. N.J.S.A. 32:1-1 (West 1963); N.Y. Unconsol. Laws Sec. 6401 (McKinney 1979). The Port Authority was created and is administered as a state agency and not as a political subdivision. N.J.S.A. 32:1-5; N.Y. Unconsol. Laws Sec. 6405. The Port Authority is governed by a Board of twelve Commissioners, six from each state. The Commissioners are appointed by the respective state governors and the governor of each state has the power to veto the actions of the Commissioners appointed from his state. N.J.S.A. 32:1-17, 32:2-9; N.Y. Unconsol. Laws Secs. 6417, 7151, et seq. Over the years the legislatures of the two states have authorized and directed the Port Authority to undertake the effectuation of various projects for the benefit of the people of the two states.

The Port Authority's bi-state transportation operations include: six interstate vehicular crossings, the George Washington Bridge, the Lincoln and Holland Tunnels, the Bayonne Bridge, Outerbridge Crossing and Goethals Bridge; four airports, Newark International Airport, Teterboro Airport, Kennedy International Airport and LaGuardia Airport; two heliports, the Downtown Manhattan Heliport and the West 30th Street Heliport; seven marine terminals, Elizabeth Marine Terminal, Port Newark, New York City Passenger Ship Terminal, Brooklyn Marine Terminal, Columbia Street Marine Terminal, Erie Basin Marine Terminal and Red Hook Marine Terminal; three industrial parks, Elizabeth Industrial Park, Bathgate Industrial Park and Yonkers Industrial Park; the Port Authority Bus Terminal; New York Union Motor Truck Terminal; The Teleport; The World Trade Center and the commuter railroad operated by the Port Authority Trans-Hudson Corporation.

To protect citizens using its facilities, the Port Authority employs its own police force, presently consisting of approximately 1,026 Officers, 124 Sergeants, 78 Detectives, 9 Detective

Sergeants, 55 Lieutenants, 2 Detective Lieutenants, 15 Captains, 5 Deputy Inspectors, 2 Inspectors, 1 Assistant Superintendent/Chief Inspector, and 1 Superintendent of Police. Port Authority police officers, pursuant to state legislation, have all of the powers conferred by law on police officers of the state and have state-wide jurisdiction. N.J.S.A. 32:2-25; N.Y. Crim Proc. Law Sec. 1.20 sub'd. 34(k); 34-a(a)(b)(c) (McKinney 1981).

The underlying dispute in this matter involves the Port Authority's use in 1985 of a promotion list, created in 1981 and designated as a three year list, to make six promotions to sergeant. In November 1983, the Port Authority, anticipating the expiration of the 1981 list, announced that a written examination was to be given on February 11, 1984 which would be used to establish a new list of qualified candidates for promotion to sergeant. This new list of qualified candidates would have reflected the growing number of women and racial minorities on the police force. On January 31, 1984 the Executive Board of the PAPBA voted to adopt a motion to boycott this examination and directed that charges be brought against any member not abiding by the approved boycott.

While negotiations for a new promotion procedure were ongoing, a serious shortage of personnel in the sergeant ranks developed. Finally, on January 25, 1985, the Port Authority notified the PAPBA that due to manpower and operational needs, it would "extend the life of the Police Sergeant eligible list which initially expired [1984] to permit additional appointments be made from the list." Before any promotions were made from the extended list, the PAPBA moved before the Port Authority Labor Relations Panel (Panel)[1] to enjoin use of the

[1] The Port Authority Employment Relations Panel adjudicates disputes between the Port Authority and its various labor organizations regarding rights and obligations flowing from the employment relationship. The Panel has duties similar in scope and nature to that of the Public Employment Relations Board (PERB) of the State of New York and the New Jersey Public Employment Relations Committee (PERC).

(Footnote continued)

list. By written decision dated March 6, 1985, the Panel refused to issue the requested injunction. Decisions of the Panel are reviewable in state court pursuant to N.J.S.A. 32:1-175 (West Supp. 1987); N.Y. Unconsol. Laws Sec. 7141 (McKinney Supp. 1987).

Instead of seeking state court review from what is essentially a labor dispute, the PAPBA, alleging a violation of 42 U.S.C. §1983, filed a complaint in the United States District Court for the District of New Jersey on March 28, 1985 contending that the use of the 1981 list deprived its members of liberty and property without due process. On the District Court's own motion, the PAPBA's motion for a preliminary injunction was consolidated with a hearing on the merits. At this hearing, the PAPBA never informed the District Court of the proceeding it had brought before the Panel or of the Panel's decision denying the PAPBA's application for an injunction requested by PAPBA.

On December 19, 1985, relying on the proofs submitted, the District Court delivered an opinion stating that the PAPBA was deprived of a property interest without due process. It directed the Port Authority not to make further promotions from the extended list and directed that the six promotions made from the list be set aside.

The Panel consists of three members. One member is appointed subject to the written recommendation, after consultation with the employee organizations, of the Chairman of the New Jersey Public Employment Relations Commission, another member is appointed subject to the written recommendation, after consultation with the employee organizations, of the Chairman of the New York Public Employment Relations Board, and the third member, the Chairman of the Panel, is appointed subject to the joint written recommendation, after consultation with employee organizations, of the Chairman of the New Jersey Public Employment Relations Commission and the Chairman of the New York Public Employment Relations Board. The members are appointed for staggered terms of three years. The Panel, among other things, adjudicates alleged violations of the Port Authority of New York and New Jersey Labor Relations Instruction. The Instruction mandates that the Port Authority may not unilaterally change "salaries, wages, hours and other terms and conditions of employment." See The Port Authority of New York and New Jersey Labor Relations Instruction, section III and section XI A(D).

After the filing of the Court's opinion, but before the entry of an order, the six individuals whose promotions were to be set aside were granted leave to intervene as defendants.

Prior to a hearing on the merits the District Court granted a motion to dismiss the complaint on the ground that the Port Authority is protected by Eleventh Amendment immunity and is therefore not a "person" amenable to suit pursuant to 42 U.S.C. §1983.

By decision and judgment dated May 27, 1987, 819 F.2d 413 (3d Cir. 1987), the Court of Appeals affirmed the dismissal of the Section 1983 action against the Port Authority upon the ground that the Port Authority as an arm of the States was entitled to Eleventh Amendment immunity.

Petitioners are being less than candid with the Court regarding the current status of the promotion procedure at issue. During the pendency of this action, the PAPBA and the Port Authority mutually agreed on a promotion procedure, a promotion examination has been given, a new promotion list established and promotions made from that list. Accordingly, the only dispute now remaining is the PAPBA's demand that the promotion of the six sergeants promoted from the 1981 list be invalidated and that those individuals be demoted.

REASONS FOR DENYING THE WRIT

Contrary to the contention of petitioners, the decision of the Third Circuit below is totally consistent with the decisions of this Court and those of other circuits.

A. *There is No Conflict with Prior Decisions of this Court.*

Petitioners claim that the decision of the Third Circuit below conflicts with the decision of this Court in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), which held that local government bodies were persons amenable to suit within the meaning of 42 U.S.C. §1983. By so arguing, however,

petitioners beg the question. Thus, beyond merely stating their conclusory proposition, petitioners completely fail to establish that the Port Authority is a "local government body" within the meaning of *Monell*.

In sharp contrast, however, the Third Circuit below:

> ". . . conclude[d] that the combined legislative-judicial characterization of the Authority indicates an intention on the part of New York and New Jersey that the Authority be considered a state agency for purposes of Eleventh Amendment immunity." 819 F.2d 413 at 415.

In so concluding, the Court of Appeals relied upon a long line of precedent so holding, to wit:

> "The state and federal courts of New York and New Jersey have consistently, whenever confronted with the question of whether or not the Authority is an arm of the state government, held that the Authority is a state agency performing functions on behalf of the state. See, e.g. *Mineo* v. *Port Authority*, 779 F.2d at 949 ('[f]rom its inception. . ., the Port Authority has been an entity of the two compacting states'), *cert. denied*, ____ U.S. ____, 106 S.Ct. 3297, 92 L.Ed.2d 712 (1986); *Newark* v. *Board of Taxation*, 54 N.J. 171, 175, 254 A.2d 513, 515 (the Authority was created by the two states as 'their joint agency'), *cert. denied*, 396 U.S. 987, 90 S.Ct. 483, 24 L.Ed.2d 452 (1969); *The Port Authority* v. *Bosco*, 193 N.J. Super. 696, 700, 475 A.2d 676, 678 (1984) (per curiam) (' "[q]uotations of this nature could be multiplied indefinitely' ") (quoting *Whalen* v. *Wagner*, 4 N.Y.2d 575, 152 N.E.2d 54, 57, 176 N.Y.S.2d 616, 619 (1958)); *Trippe* v. *Port of New York Authority*, 14 N.Y.2d 119, 122, 123, 198 N.E.2d 585, 586, 249 N.Y.S.2d 409, 410, 411 (1964) (the Authority is a 'governmental agency' and a 'direct agency' of the two states).' " *Id.*

The Third Circuit took particular note of the fact

> ". . .that this long-standing judicial characterization of the Authority has never been questioned by either state legislature despite the numerous opportunities to overrule these decisions presented by the periodic amendments the legislatures have made to the statutes." *Id.*

Consequently, it is clear that petitioners have failed to establish any conflict whatsoever with *Monell.*

So too, petitioners have totally failed to establish that the Third Circuit has misapplied this Court's decision in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). Although petitioners' argument is hardly a model of clarity, petitioners seem to be focusing mainly on the financial structure of the Port Authority and what they argue is its independence from the state treasuries. There are several fallacies to petitioners' approach.

First and foremost, petitioners obviously completely misapprehend the scope of Eleventh Amendment immunity, considering their statement on page 9 of the petition that " . . . the rationale behind the Eleventh Amendment is a prohibition of (sic) raiding state treasuries." Petitioners are simply mistaken. In point of fact, suits seeking injunctive relief against the state, such as the instant suit[2], are as much barred by the Eleventh Amendment as are suits for money damages. See, *inter alia*, *Alabama* v. *Pugh*, 438 U.S. 781, 782 (1978).

Because of their obvious misunderstanding, petitioners continue to mischaracterize this Court's decision in *Lake Country Estates, supra*, by implying that the potential liability of the state treasuries is the most important factor to be considered

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[2] Thus, the statement on page ll of the petition " . . . that . . . any damages awarded in this action would not be paid out of either state's treasury" is a glaring *non sequitir.*

for a determination of state agency status with respect to Eleventh Amendment immunity. However, this Court has never held such a factor to be the *sine qua non* for immunity. Indeed, in commenting on this factor in *Lake Country Estates*, this Court simply made the observation that "some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself", 440 U.S. at 400-401 (footnote omitted). Nowhere in the *Lake Country Estates* opinion, however, is there any indication that this factor is to be controlling.

Moreover, petitioners simply are misconstruing the decision of the Third Circuit in this regard. The Court of Appeals below was under no illusion, nor did it ever hold, that some potential financial dependency on the part of the Port Authority dictated their finding of state agency status. Indeed, the Third Circuit specifically noted that:

> ". . .the Authority's current funding structure does not provide conclusive evidence that the Authority is an agency of the state . . ." 819 F.2d at 416.

Nevertheless, the Court of Appeals was able to find the Port Authority's funding to be "clearly distinguishable from the funding of the RPA found damaging to that agency's immunity claim in *Lake Country Estates*." *Id.* That flaw was the fact that the Tahoe Regional Planning Agency received its funding from the counties rather than the state governments. See in this regard *Lake Country Estates*, 440 U.S. at 401-402. In sharp contrast, the Third Circuit found with respect to the Port Authority:

> "The Authority's ability to be self-supporting as a result of the General Reserve Fund does not support the same conclusion. Significantly, the uses to which the money from the Authority's General Reserve Fund may be put are strictly circumscribed by periodic legislation and may only be dedicated to purposes within the Authority's statutory mandate and for the benefit of the citizens of the two states. This is in stark

> contrast to the RPA's use of its funds, which are directed towards the needs of the counties and their residents, and spent with no legislative input from the states. Thus, *although the Authority is no longer directly funded by the states, we conclude that the history of its financial structure, and the statutory constraints placed on the use of its funds, indicate that the Authority is considered an arm of the states by New York and New Jersey.*" 819 F.2d at 416. (emphasis added)

Petitioners' other attempts to create a conflict between the decision below and *Lake Country Estates* are similarly without merit. Completely ignoring the numerous other indicia of state control listed by the Third Circuit, *e.g.* gubernatorial appointment and legislative confirmation of Commissioners; the gubernatorial veto; the requirement of an annual report to the legislatures; the requirement of legislative authorization for Port Authority projects, etc., (819 F.2d at 417), petitioners boldly state, on the basis of a mere trial court opinion, namely, *People of the State of New York* v. *The Port of New York Authority*, 64 Misc. 2d 563 (Sup. Ct. N.Y. Co. 1970), that the states must sue the Port Authority in order to control it (Petition at 11). However, petitioners clearly are misapplying the case. The matter arose in such posture for the simple reason that injunctive relief does not lie against the Port Authority in state court unless actions therefor are brought by the state's attorney general. See in this regard, N.J.S.A. 32:1-161; N.Y. Unconsol. Laws Sec. 7105.

Finally, petitioners rely on *County of Bergen* v. *Port of New York Authority*, 32 N.J. 303 (1960) for their conclusory proposition that the Port Authority is performing functions similar to a county. Nowhere does that case so hold. *County of Bergen* merely held that the County had no standing to sue with respect to the Port Authority's activities at Teterboro Airport and that, in fact, it was the Port Authority and not Bergen County which represented the public interest with respect to the airport, 32 N.J. at 312. Such a statement certainly falls far short of contradicting the long line of precedent, cited by the Third Circuit, fully establishing that the Port Authority is an agency of

the States of New York and New Jersey. Quite obviously, petitioners have completely failed to establish any conflict between the decision of the Third Circuit and prior decisions of this Court.

B. *The Decision Below Does Not Conflict with Third Circuit Precedent*

Petitioners also argue that the decision below conflicts with a prior decision in the Third Circuit, namely *Blake* v. *Kline*, 612 F.2d 718 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). Petitioners' proposition is absurd on its face. While it might make some sense to argue the existence of a conflict if the Court had completely ignored or had given short shrift to the prior *Blake* decision, it makes no sense whatsoever here where the decision below is fully harmonized with *Blake*. Indeed, the Circuit Court found that by analyzing the Port Authority pursuant to factors they previously had laid down in *Blake*, *Blake*, in fact, compelled the result, to wit:

> "Thus, under the more rigorous requirements of *Blake* v. *Kline*, the Port Authority is clearly an agency of the state and is thus entitled to Eleventh Amendment immunity." 819 F.2d at 418.

In any event, intracircuit conflict is not normally a sufficient reason for this Court to grant certiorari. Such "conflicts" generally are to be resolved by a rehearing *en banc*. See in this regard, R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice*, ¶4.6 (6th Ed. 1986), citing *Davis* vs. *United States*, 417 U.S. 333, 340 (1974).

Moreover, petitioners' main basis for claiming a conflict at bar is what they perceive to be the greater weight accorded by the *Blake* Court to the "financial independence" factor. Petitioners' reliance, however, is completely misplaced, since in *Blake*, a money judgment was being sought in contract and in tort against the trustees of a state employee retirement fund. Here, it cannot be overemphasized, only injunctive relief is being sought. Furthermore, to the extent that *Blake* did hold the

"financial independence" factor to be "most important", 612 F.2d 718, 723, that holding must give way to this Court's decision in *Lake Country Estates* in which, as we previously have noted, this Court failed to find that any one factor was in and of itself determinative of immunity.

C. *There is No Intercircuit Conflict to be Resolved by this Court*

Finally, petitioners urge that the decision below conflicts with decisions in other circuits which have found some other public bodies to be amenable to suit. However, petitioners have failed to establish anything more than the fact that under the authorities they cite, those courts were unwilling to find that those particular bodies were state agencies for purposes of Eleventh Amendment immunity.

Indeed, we respectfully submit that as this Court's decision in *Lake Country Estates*, *supra*, makes crystal clear, a determination of Eleventh Amendment immunity for any particular body is so dependent upon factors specific to that body, each case must be, by definition, almost *sui generis*. Thus, we further submit, it would be appropriate to speak of intercircuit conflict, if and only if, the circuits have divided on the question with respect to the same or a virtually identical body. Petitioners simply have failed to establish any such conflict in the instant case.

More specifically, *Raysor* v. *Port Authority of New York and New Jersey*, 768 F.2d 34 (2d Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1227 (1986), cited by petitioners on page 15 of their petition, does not establish such a conflict since the Eleventh Amendment issue simply was not raised. See in this regard *O'Donnell* v. *The Port Authority of New York and New Jersey*, 84 Civ 8188 (CES) (S.D.N.Y. September 3, 1987) (RA4).[3] As petitioners themselves are forced to acknowledge, all the Second Circuit held in *Raysor* was that a §1983 violation against the Port Authority was neither properly pleaded nor proven.

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[3] "RA" followed by a numeral refers to pages in the Respondent's Appendix.

Doris Trading Corporation v. *The SS Union Enterprise*, 406 F.Supp. 1093 (S.D.N.Y. 1976) and *Principe Compania Naviera, S.A.* v. *Board of Commissioners of the Port of New Orleans*, 333 F. Supp. 353 (E.D. La. 1971), were district court decisions in which money judgments were being sought and which antedated this Court's decision in *Lake Country Estates*. Since these opinions obviously do not employ the analysis delineated by this Court in *Lake Country Estates*, *supra*, they cannot serve to establish any conflict with the decision of the Third Circuit below.

Jacintoport Corp. v. *Greater Baton Rouge Port Commission*, 762 F.2d 435 (5th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986), is similarly distinguishable from the instant case since a money judgment in addition to injunctive relief was being sought therein. The Fifth Circuit, therefore, weighed the "financial independence" factor quite heavily, 762 F.2d 440-442. Moreover, a simple reading of the *Jacintoport* decision clearly establishes that the Fifth Circuit was less impressed with the consistency of treatment of the Greater Baton Rouge Port Commission as a state agency by the Louisiana courts, *Id.* at 439-440, than was the Third Circuit with both the legislative and judicial characterization of the Port Authority by the States of New York and New Jersey in the case at bar. See Subpoint A, *supra*.

In short, it is clear that the Fifth Circuit in *Jacintoport* applied the same criteria as did the Third Circuit below, i.e. *Lake Country Estates* and *Blake*. The different results are explained by the fact that the relief being sought and the characteristics of the agencies involved were different.

Finally, we note that very recently the United States District Court for the Southern District of New York in *O'Donnell*, *supra*, dismissed a complaint against the Port Authority in a §1983 case upon the ground that the Port Authority was immune from suit under the Eleventh Amendment (RA4). *O'Donnell* is thus fully in accord with the Third Circuit.

In view of the foregoing, it is clear that petitioners have failed to establish any basis whatsoever for this Court to grant their petition for a writ of certiorari.

CONCLUSION

The Petition for a Writ of Certiorari Should Be Denied.

Dated: October 25, 1987

Respectfully submitted,

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APPENDIX

RESPONDENT'S APPENDIX

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEORGE O'DONNELL,

Plaintiff,

– against – 84 CIV. 8188 (CES)

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,

Defendants.

New York, New York
September 3, 1987
3:00 p.m.

Before:

HON. CHARLES E. STEWART,

District Judge

ECKHAUS & SCOLNICK,
Attorneys for plaintiff,

STEVEN ECKHAUS,
Of Counsel

PHILIP A. MAURER,
Attorney for defendant
Port Authority of New York
and New Jersey

THE COURT: Gentlemen, I have reviewed the record and have reached some conclusions which I will give you. It has not been an easy job. I will give you my opinion now.

In this action plaintiff seeks relief under section 1983, claiming in count one, which is the only remaining count, all others having been dismissed, that he has been deprived of various constitutional rights. Prior to the fall of 1984 plaintiff had been active in the Port Authority union, the Patrolmen's Benevolent Association, and in the course thereof had criticized some of its actions. He also had been involved in legal matters in which he took positions apparently opposed to that taken by the Port Authority.

In September 1984, plaintiff was involved in an episode in which it was alleged by a superior officer, Lieutenant Finnegan, that plaintiff had gone off duty without permission to do so in violation of a return roll call. It was alleged that he was present when the lieutenant issued the order for a return roll call but thereafter went off duty prematurely in disregard of these instructions. At that time the defendant Captain Elique had just been placed in charge of the Port Authority Bus Terminal where plaintiff was assigned to work. Pursuant to the rules of the Port Authority, Elique summoned plaintiff to his office on October 17, 1984, to serve him with these charges. Plaintiff arrived with Mark O'Neill, a union delegate, to assist him. Elique remained seated at his desk and plaintiff was seated in front of him. O'Neill was seated to the right and to the rear of plaintiff who was separated from O'Neill by a small table.

While Elique was serving the charges on plaintiff Elique claims that plaintiff removed his shoes and socks and crossed his right knee with his left foot, left leg. Elique, presuming that plaintiff was trying to aggravate him, said and did nothing about this. After Elique finished presenting the charges, the meeting, which took about five or six minutes, ended. Neither plaintiff nor O'Neill said anything at the meeting. Plaintiff denies that he removed his shoes and socks. O'Neill testified that he did not see plaintiff remove his shoes and socks, but emphasized that he could not say that it did not happen. Also, he declined to sign

an affidavit later that it did not happen and required that affidavit be revised to state that he did not observe it.

At the meeting plaintiff had a tape recorder which he turned on and kept hidden so that Elique was not aware of it. Elique testified that when he learned of this it suggested to him that plaintiff hoped to incite Elique into making incriminating or inflammatory remarks by taking off his shoes and socks.

Two sergeants spoke to Elique about an hour and a half after the episode and asked about plaintiff taking off his shoes and socks and whether it had happened. They said they had heard about it from other police officers. This suggests that plaintiff had reported the episode to others. In any event we find that, based on all the evidence, plaintiff did remove his shoes and socks. Plaintiff has failed to show by a preponderance of the evidence that Captain Elique's testimony was not accurate and truthful. Thereafter Captain Elique discussed the matter with Inspector Boland, who accepted Elique's recommendation that plaintiff be examined by a psychiatrist.

Boland arranged for plaintiff to see Dr. Hess, which he did on November 5. There was no evidence that Boland gave any instructions to, or made any requests of, Hess other than to schedule the examination. On November 5, when plaintiff appeared before Dr. Hess, plaintiff announced that he had a tape recorder and intended to use it. Dr. Hess said that he wouldn't allow it, but plaintiff insisted, and then Dr. Hess refused to go ahead with the examination. He filed a report that plaintiff was "psychiatrically unfit for police duty which would require carrying a gun until an adequate examination can be obtained."

Pursuant to Dr. Hess's record Boland issued instructions as provided by the rules that plaintiff be placed on medical restriction and that his gun, shield and identification card, his ID card, be taken from him. This meant that plaintiff had to stay at home unless he received permission to leave, which incidentally was granted him on request. And he continued on full pay.

Subsequently, in early December, plaintiff agreed to a medical exam without a tape recorder and was found by another doctor to be fit to return to duty.

We find that there was no impropriety by either Elique or Boland at any stage of these proceedings.

Subsequently, plaintiff was found to have acted improperly by leaving the return roll call without permission and was docked two days' pay. Plaintiff complains about a missing tape recording of the radio calls in connection with the return roll call episode. Since the charge against plaintiff, however, depended not on what was carried on the radio but on the oral orders of Lieutenant Finnegan, given while plaintiff was present, the tape recording would not have been relevant.

Both Elique and Boland testified that they had no interest in the affairs of the union, had no reason to interfere in any way with union activities and were not aware that plaintiff was running for office at the time of the episode in question.

There is no evidence to support plaintiff's contention that Elique and Boland acted to prejudice plaintiff's efforts to be elected to union office. Accordingly, we grant defendants' motion to dismiss the complaint as to the two individual defendants, including the charge of false imprisonment which was added at the last moment.

With respect to the Port Authority there is no evidence to support plaintiff's claims as to it, and in any event under the Eleventh Amendment the Port Authority is not amenable to suit in this case. I am relying on a Third Circuit opinion, Port Authority Police Benevolent Association v. The Port Authority, 819 F.2d 413 (3d Cir.1987). The plaintiff has pointed to a Second Circuit decision, Raysor v. The Port Authority, 768 F.2d 34 (2d Cir.1985), which I believe is not pertinent, because the question of the Eleventh Amendment immunity was not raised in that case.

With respect to the Port Authority, none of its rules which are here in question were shown to be unconstitutional and they were properly applied in a constitutional manner.

Gentlemen, I want to thank counsel for adjusting their schedules to mine. I appreciate everything you did to help me. I reached a decision which I believe is appropriate from the evidence. As is frequently the case I wish I could decide the case for both parties.

87-297

Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1987

THE PORT AUTHORITY POLICE BENEVOLENT ASSOCIATION, INC.; and DOMINICK EVANGELISTA, individually and as President of the Port Authority Police Benevolent Association, Inc.,

Petitioners,

vs.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent,

Kirk Nelson, Donald F. Delano, Dennis Flavin, Charles Cossentine, Eugene Ceccarella and George Albin (Intervenors).

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT-INTERVENORS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT-INTERVENORS

To the Honorable, The Justices of the Supreme Court of the United States of America:

Kirk Nelson, Donald F. Delano, Dennis Flavin, Charles Cossentine, Eugene Ceccarella and George Albin, the respondent-intervenors, by their attorneys, Leeds & Morelli, file this brief in opposition to the petition for writ of certiorari and present the following:

REASONS FOR DENYING THE WRIT

I.

There is no conflict with the decisions of this Court.

Petitioner claims that the decision below is in conflict with *Monell v. New York City Department of Social Services,* 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). In *Monell,* the Court held that the word "person" as used in 42 U.S.C. § 1983, included "local government bodies," which could be sued under the Civil Rights Act.

However, the Court of Appeals directly addressed the issue of whether the Port Authority of New York and New Jersey was considered a local government body, and found that it was not. The Third Circuit, followed the Court's reasoning set forth in *Lake Country Estates v. Tahoe Regional Planning Agency,* 440 U.S. 391, 59 L. Ed. 2d 401, 99 S. Ct. 1171 (1979). In *Lake Country Estates, supra,* the Court "granted certiorari to decide whether the Tahoe Regional Planning Agency, an entity created by compact between California and Nevada, is entitled to the immunity that the Eleventh Amendment provides to the compacting States themselves" 440 U.S. at 393.

The Court specifically addressed the issue of whether

California and Nevada in creating the Tahoe Regional Planning Agency (RPA), had created a state agency or a political subdivisional and thus, entitled to Eleventh Amendment immunity. The Court set forth several factors which it used as a guide to aid in its determination.

Using the several factors outlined in *Lake Country Estates, supra,* the Third Circuit found that the Port Authority of New York and New Jersey was an arm of the compacting states rather than a body "comparable to a county or municipality," within the meaning of *Lake Country Estates, supra,* 440 U.S. at 401. Thus, the Port Authority is entitled to Eleventh Amendment immunity.

The petitioner would have the Court believe that since the Court in *Lake Country Estates, supra,* found that the Tahoe Regional Planning Agency was charged with the creation and implementation of a master plan for the geographic area under its control and that allegedly, the Port Authority is also authorized to prepare and implement a master plan for the development of the Port District (N.J.S.A. 32:1-35.74), the Port Authority should be characterized as "local governing body" because the Tahoe Regional Planning Agency was considered a local governing body.

However, what the RPA was authorized to accomplish is not the factor that led the Court to conclude that it was a local government body. Indeed, petitioner readily concedes that the Port Authority and the Tahoe Regional Planning Agency are quite distinguishable (Petitioner's Brief, p. 9). As the Third Circuit stated,

> [T]he fatal aspect of the RPA's funding structure was the fact that it received its funding from its participating county governments rather than the state governments. See 440 U.S. at 402. This fact,

> together with the other significant characteristics of the RPA, indicated that it was a creature of the countries rather than the states, and thus would not enjoy Eleventh Amendment immunity.

(Petitioner's Brief, Appendix A, p. 7).

However in the instant case, if the Port Authority did need financial support, that support would be provided by the states. Contrary to the petitioner's assertion, the Third Circuit, did not misquote Compact Article XV (N.J.S.A. 32:1-16) and its purpose. The court had previously set out Compact Article XV in its opinion (Petitioner's Brief, Appendix A, pp. 6-7). It is clear that the court was well aware of the contents of the provision and its meaning. Thus, the fact that the court did not set out Article XV in full again, is without consequence.

Therefore, it is clear the Authority would be able to proceed to the state legislatures in order to recoup the amount needed for its operating expenses. *See* N.J. Stat. Ann. 32:1-16 (West 1963); N.Y. Unconsol. Laws § 6416 (McKinney 1979) (Compact Article XV) ("Unless . . . the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate [the amount needed]."") (Petitioner's Brief, Appendix A, p. 8).

The Third Circuit went through each of the factors the Court used in *Lake Country Estates, supra,* to decide whether an entity created by interstate compact was an arm of the state and thus entitled to Eleventh Amendment immunity. Thus, as the principles set forth in *Lake Country Estates, supra,* were followed by the Third Circuit in the instant matter and it was merely the facts that distinguish the outcome of the two cases, there is no reason to reargue it.

II.

There is no conflict with Third Circuit precedents.

The present decision is fully in accord with the only other decision by the Court of Appeals for the Third Circuit in which the issue of Eleventh Amendment immunity was in dispute.

The petitioner asserts that the present decision is somehow in conflict with the Third Circuit's decision in *Blake v. Kline,* 612 F.2d 718 (1979), in which the matter of Eleventh Amendment immunity was at issue. However, petitioner's contention is wholly without merit. The Court of Appeals explicitly states in its opinion that it used the factors outlined in *Blake v. Kline, supra,* as a guide in determining that the Port Authority is protected by Eleventh Amendment immunity. Indeed, the Third Circuit discusses, at length, the factors set forth in *Blake v. Kline, supra* (Petitioner's Brief, Appendix A, p. 10). Thus it is clear that the Court of Appeals in this case followed *Blake v. Kline, supra*, and there is no conflict in the Third Circuit.

Furthermore, petitioner's reasoning is in direct contradiction to the Third Circuit's prior holding in *Mineo v. Port Authority of New York and New Jersey,* 779 F.2d 939 (3d Cir. 1985), *rehearing and rehearing en banc denied,* 783 F.2d 42 (3rd Cir. 1986); *cert denied,* 54 U.S.L.W. 3859 (1986), which ruled that the Port Authority was a "State" for the purposes of Tenth Amendment immunity, using the Eleventh Amendment immunity test laid out by the Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra.* If the Third Circuit, in applying an Eleventh Amendment test, and after reviewing Eleventh Amendment cases, made the determination that there was Tenth Amendment immunity, it certainly follows that there is Eleventh Amendment immunity as well. In fact, the Third Circuit went as far as to pronounce the Port Authority "an entity run as an

independent State agency with little or no supervision by the federal government." *Mineo v. Port Authority of New York and New Jersey, supra*, at 949 (emphasis added). As a state agency, the Port Authority is entitled to Eleventh Amendment immunity. Hence, the petitioner has not shown a conflict within the Third Circuit and there is no reason to reargue the issue.

III.

There is no conflict with other courts.

Contrary to petitioner's views, the Second Circuit's decision in *Raysor v. Port Authority of New York and New Jersey*, 768 F.2d 34 (2d Cir. 1985) is not in conflict with the Third Circuit in the instant matter. *Raysor, supra,* involved matters wherein the Port Authority had consented to suit and was thus not immune from suit. N.Y. Unconsol. Laws § 7101 (McKinney 1979). However, the instant matter involves an action for injunctive relief against the Port Authority. The Port Authority of New York and New Jersey has consented to suits against it, but the consent does not extend to suits seeking to enjoin Port Authority action. N.Y. Unconsol. Laws § 7105 (McKinney 1979). Specifically, N.Y. Unconsol. Laws § 7105 (McKinney 1979) states:

> [T]he foregoing consent does not extend to suits, actions or proceedings for judgments, orders or decrees restraining, enjoining or preventing the port authority from committing or continuing to commit any act or acts, other than suits, actions or proceedings by the attorney general of New York or by the attorney general of New Jersey . . . .

The petitioner also asserts that the Third Circuit Court of Appeals is in conflict with the Fifth's Circuit decision in

Jacintoport Corp. v. Greater Baton Rouge Port Commission, 762 F.2d 435 (5th Cir. 1985). This assertion is wholly without merit. In fact, the court in *Jacintoport, supra,* explicitly states that it used the test of the Third Circuit as a guide to determine that the Greater Baton Rouge Port Commission did not merit Eleventh Amendment immunity. 765 F.2d 435, 437 (5th Cir. 1985). Therefore, to suggest that *Jacintoport Corp., supra,* is somehow in conflict with the Third Circuit in the instant action is simply ludicrous.

Similarly, the petitioner presents arguments that there is conflict in the district courts. However this is not the case. Both cases cited by the petitioner were decided before the Court decided *Lake Country Estates, supra. Lake Country Estates, supra,* clearly sets forth the test to be used in determining whether an entity created by interstate compact was an arm of the compacting states, rather than a body "comparable to a county or municipality." 440 U.S. at 401. The present decision is fully in accord with *Lake County Estates* and therefore, there is no reason to reargue it.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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